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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Phoenix Intangibles Holding Company

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Serial No. 76470576

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David V. Radack of Eckert Seamans Cherin & Mellott, LLC, for Phoenix Intangibles Holding Company.

Rebecca A. Smith, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

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Before Hanak, Quinn and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Phoenix Intangibles Holding Company, has filed an application to register the mark BRILLIANCE for goods which were ultimately amended to "dishwashing detergents."[1]

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles

[1] Serial No. 76470576, filed November 27, 2002, asserting a bona fide intention to use the mark in commerce.

the registered marks shown below, each owned by a different entity, as to be likely to cause confusion.[2]

Registration No. 2550158:[3]

BRILLIANCEGUARD

Chemical products for use in the manufacture of detergents in the consumer cleaning products industry; descaling detergent concentrates; water softeners for commercial or industrial use; protective preparations for the prevention of tarnishing of glassware, porcelain and earthenware, crockery and other kitchenware, all aforementioned goods with and without a disinfectant component. In International Class 1

Bleaching preparations for laundry and dishwashing in solid, fluid and gel form; laundry preparations for dry cleaners; polishing preparations for kitchen and glassware; cleaning, polishing, scouring and abrasive preparations; carpet cleaning preparations; laundry and dishwashing detergents in solid, fluid and gel form; soaps for household purposes; declacifying [sic] and descaling preparations for household purposes; fabric softeners, laundry additives, namely, stain removing preparations; all aforementioned goods with and without a disinfectant component. In International Class 3.

Registration No. 1765476:[4]

BRILLIANCE

Floor cleaning preparations. In International Class 3.

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[2] In her first Office action, the examining attorney had also cited a prior pending application as a possible Section 2(d) reference. The application subsequently issued into a registration, but because the registration was thereafter voluntarily cancelled by the registrant, the reference was withdrawn in the final action.

[3] Issued on March 19, 2002 to Reckitt Benckiser N.V..

[4] Issued on April 20, 1993 to Ecolab Inc.; renewed.

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarities of the marks and the similarities of the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to consider the question of likelihood of confusion with respect to Registration No. 2550158 for the mark BRILLIANCEGUARD. The goods in the application and this registration are, in part, legally identical, as applicant admits. Brief, p. 3. The registration includes dishwashing detergents in solid, fluid and gel form with and without a disinfectant component which are fully encompassed by the broadly identified dishwashing detergents in the subject application.

Because these goods are legally identical and there are no restrictions as to their channels of trade or classes of purchasers, they must be deemed to be sold in the same channels of trade, and directed to the same purchasers. Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000).

Thus, we turn our attention to the marks, keeping in mind that when marks would appear on identical goods, the degree of

similarity between the marks necessary to support a finding of likely confusion declines. Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that confusion is not likely in view of the differences in the marks and the "weakness and dilute nature" of the term "BRILLIANCE." Applicant maintains that the dominant portion of registrant's mark is the term "GUARD" and that consumers will focus on that portion of the mark and give less weight to the shared term "BRILLIANCE." Pointing to the two cited registrations as well as the existence of a registration for LIQUID BRILLIANCE for automotive polish, and a cancelled registration for the mark BRYLLANT for dishwashing detergent, applicant contends that there are "numerous" registrations containing the term "BRILLIANCE" for cleaning supplies, and that the term "when applied to the broad category of cleaning products, is dilute and extremely weak" and entitled only to a narrow scope of protection.[5] Brief, pp. 2-3.

[5] Applicant also argues that its mark "is more closely related to the canceled BRYLLANT mark than it is to the cited registration"; that "it would be manifestly unfair to block registration of Applicant's mark based on the cited registration when that cited registration was allowed over the now-canceled BRYLLANT mark"; and that applicant "should not be singled out and subjected to inconsistent treatment in this case." Brief, p. 4. To begin with, we find nothing inconsistent between the prior co-existence on the register of BRYLLANT and BRILLIANCEGUARD and the refusal of registration herein. BRYLLANT is not the phonetic equivalent of "brilliance" or even "brilliant" which in itself could explain why the examining attorney in that case did not believe there would be likelihood of confusion. In any event, the Board has often noted that each application must be decided on its own merits. We are not privy to the records of the third-party registration files and, moreover, the determination of registrability of those particular marks by the examining attorneys cannot control our decision in the case now before us. See In

Third-party registrations, although not evidence that the marks shown therein are in use or that the public is aware of them may be used to show that a particular mark or element of a mark has a suggestive or commonly understood meaning in a particular field.[6] Conde Nast Publications Inc. v. Miss Quality, Inc., 180 USPQ 149 (TTAB 1973), aff'd, 507 F.2d 1404, 184 USPQ 422 (CCPA 1975). See also AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). In this regard, we acknowledge, with or without the few third-party registrations relied on by applicant, that the word "BRILLIANCE" has a suggestive meaning in relation to registrant's goods. However, the mere presence of the same suggestive, or even "weak" term in two marks does not automatically mean that confusion is not likely. Even weak marks are entitled to protection against the registration of a similar mark for identical goods. See Plus Products v. Pharmavite Pharmaceutical Corporation, 221 USPQ 256 (TTAB 1984). See also King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

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re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's application], the PTO's allowance of such prior registrations does not bind the Board or this court.")

[6] On the other hand, a cancelled registration is of no persuasive value.

In this case, when the marks are compared in their entireties, we find that applicant's mark BRILLIANCE is similar in sound, appearance and commercial impression to the cited mark BRILLIANCEGUARD. The word BRILLIANCE is applicant's entire mark and is visually and aurally a significant part of the registered mark. We disagree that "GUARD" is the dominant part of registrant's mark and that consumers will essentially disregard the word BRILLIANCE. The word BRILLIANCE is only suggestive of registrant's goods, not devoid of trademark significance. Moreover, as the first word purchasers will see or hear when encountering registrant's mark, it is likely to be remembered by purchasers when they encounter applicant's mark BRILLIANCE, alone, on the identical goods at a different time. See Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895 (TTAB 1988).

Further, both marks convey similar suggestive meanings and the additional word GUARD in registrant's mark does not significantly change the meaning or commercial impression created by BRILLIANCE alone. The word BRILLIANCE suggests that applicant's dishwashing detergent leaves dishes sparkling and the term BRILLIANCEGUARD suggests that registrant's dishwashing detergent protects this sparkling finish.

Because the two marks are visually and aurally similar and convey similar meanings in relation to applicant's and registrant's directly competitive products, and also keeping in mind that the

comparison of the marks is not made on a side-by-side basis and that recall of purchasers is often hazy and imperfect, the differences in the two marks are not so significant that they are likely to be remembered by purchasers when seeing these marks at different times on identical goods. This is particularly true when we consider that the purchasers of dishwashing detergents are ordinary members of the general public who, especially considering the inexpensive nature of these types of products, would not be expected to exercise a high degree of care and thus would be more prone to confusion.

Under the circumstances, we find that a likelihood of confusion exists between BRILLIANCE and BRILLIANCEGUARD for identical goods.

We turn then to consider the question of likelihood of confusion with respect to the registered mark BRILLIANCE for floor cleaning preparations. Here, applicant's mark is identical in all respects to registrant's mark. When marks are identical it is only necessary that there be a viable relationship between the goods in order to support a holding of likelihood of confusion. See In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983). With that in mind, we turn to a consideration of the goods.

Applicant's dishwashing detergent, on the one hand, and registrant's floor cleaning preparations, on the other, are at least viably related products. The examining attorney has made of

record a number of third-party registrations which show, in each instance, a mark which is registered by the same entity for both products. These registrations, while not evidence of use of the marks therein, tend to show that purchasers would expect the types of products offered by applicant and registrant, if sold under similar marks, to emanate from the same source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); and In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988).

While the specific uses of the products differ, as applicant notes, they both nonetheless constitute basic household cleaning preparations which would typically be sold to the same classes of purchasers in the same types of stores.

Applicant acknowledges that the registration does not contain any limitations in purchasers or trade channels. At the same time, however, applicant argues, relying on information obtained from registrant's website, that registrant appears to service the professional janitorial market whereas applicant's goods "are marketed exclusively to retail supermarket customers" and concludes based thereon that it is unlikely that the respective products would ever be sold in the same marketing channels. Applicant further contends that even if the products are sold in the same retail channels, such as a supermarket, they would be found in different parts of the retail store.

By its arguments that the goods are not in same channels of trade, and are not directed to the same purchasers, applicant has read impermissible limitations into the application and registration. As our primary reviewing court has often stated, the question of likelihood of confusion is determined on the basis of the identification of goods set forth in the application and registration, rather than on the basis of what evidence might show the actual channels of trade or purchasers to be. See J & J Snack Foods Corp. v. McDonalds' Corp., 932 F.2d 1460, 1464, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

In the absence of any specific restrictions in the registration as to the channels of trade or classes of purchasers, it must be presumed that registrant's floor cleaning preparations are sold in all the usual outlets for such goods, including supermarkets, and that the goods are offered to all the usual purchasers, including ordinary consumer purchasers.

We have no evidence that applicant’s and registrant’s products typically would be displayed in different aisles or sections of a

store nor do we find that to be an important consideration since these products may not even be purchased at the same time.[7]

Furthermore, applicant's and registrant's cleaning products are inexpensive items that are likely to be purchased on impulse. Consumers who are familiar with the registrant's floor cleaning preparations under the mark BRILLIANCE, notwithstanding its suggestive meaning, upon later seeing applicant's dishwashing detergents sold under the identical mark, are unlikely to give the matter great thought, but will simply assume that the respective products emanate from the same source.

In view of the foregoing, and because the identical marks BRILLIANCE are used in connection with at least viably related goods, we find that there is a likelihood of confusion.

To the extent that there is any doubt on the issue of likelihood of confusion with respect to either one of the cited registrations, it is settled that such doubt must be resolved in favor of the prior registrants. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register as to each registration is affirmed.

[7] In any event, it is reasonable to assume that ordinary household cleaning products such as dishwashing detergents and floor cleaning preparations may indeed be sold in proximity to each other in a supermarket.